IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

VALLEY FORGE INSURANCE COMPANY and LUTHERAN BENEVOLENT INSURANCE EXCHANGE,	)	
Plaintiffs,	)	
vs.	)	**No. 96-CV-1172 K**
MORRIS DALE VANDERFORD; CATHOLIC DIOCESE OF TULSA; SAINT CECILIA CATHOLIC CHURCH; and GLENN ANDREW PRATER,	)	
Defendants.	)	

ORDER

NOW ON THIS 18 day of July, 1997, the Motion to Substitute Jay Angoff, Director of the Missouri Department of Insurance, for Plaintiff, Lutheran Benevolent Insurance Exchange is before the Court. After reviewing the Motion, said Motion is hereby granted, and Jay Angoff, Director of the Missouri Department of Insurance, and his successor or successors, as Liquidator for Lutheran Benevolent Insurance Exchange, is hereby substituted as party plaintiff for Lutheran Benevolent Insurance Exchange.

UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KEITH ROSS,

Plaintiff,

vs.

RON CHAMPION,
BILL McKENZIE, et al.,

Defendants.

No. 97-CV-60-K

ORDER

Before the Court is the Report and Recommendation of the Magistrate, filed March 19, 1997, recommending dismissal without prejudice of plaintiff's action for his failure to pay the partial filing fee. There have been no objections filed. The docket reveals that a letter postmarked March 28, 1997, from plaintiff was received by the Clerk of this Court, explaining plaintiff's inability to timely pay the initial partial filing fee due to his transfer to another correctional facility and enclosing the initial fee due. For good cause, and in light of plaintiff's payment of the initial fee, the Court overrules as moot the Magistrate's report (#5) recommending dismissal without prejudice for non-payment.

In this pro se civil rights action, Plaintiff Keith Ross (Ross), a state inmate, alleges that his due process rights were violated in a prison disciplinary proceeding which resulted in the loss of 40 earned credits, 30 days of disciplinary segregation, and a $50 fine. The Court liberally construes Plaintiff's complaint as a request to direct the Department of Corrections (DOC) to expunge his misconduct and to find that the DOC violated his due process rights.[1] See Haines v. Kerner, 404 U.S. 519, 520-21 (1972). Service of process upon defendants has not been issued.

[1]As stated in the complaint, Plaintiff requests "expungement or $10,000 dollars as compensation for the deprivation of my liberty interest" (#1 at pg. 5).

For the reasons discussed below, the Court finds that this case should be dismissed without prejudice.

BACKGROUND

On October 11, 1996, at approximately 3:50 p.m., an institutional lockdown of the Dick Conner Correctional Center was enforced. Approximately thirty minutes later, one of the prison officials requested the identification card of Plaintiff's cellmate, Omar Pollard. Shortly thereafter, the prison official returned to the cell, arrested Plaintiff, and placed him in segregation pending investigation of aggravated assault. According to policies of the Department of Correction ("DOC"), a special investigation of this incident was conducted, after which, a misconduct report was filed, charging "that i/m Ross along with other i/m's [sic] did assault and injure another i/m." (Pl.Ex. Disciplinary Hearing Actions, signed by Ron Champion 11/01/96.)

Plaintiff requested as evidence of his innocence the statement of inmate Anthony Inkton #197164, the inmate who allegedly was assaulted by Plaintiff. The statement was secured and stated, in part, " I/m Ross, 205798, had nothing to do with incident on 10-11-96. Me and I/m Ross are good friends." (Pl.Ex. statement of I/M Inkton, Anthony #197164, signed by Lt. Dewayne Jones, 10-29-96, 2:40 pm.)

A disciplinary hearing was held on October 31, 1996, at which Plaintiff was found guilty of disruptive behavior based on the "confidential witness statements, reporting employee, Bill McKenzie, Special Investigator's statement that I/M Ross along with other I/Ms did assault and injure another I/M." Punishment of thirty days in segregation, loss of forty days earned credits and a $50.00 fine

was imposed. Plaintiff exhausted his administrative remedies by appealing the disciplinary hearing decision to Warden Champion and to Officer Ramsey, both of whom affirmed the findings on November 25, 1996 and January 6, 1997, respectively. (Pl.Ex.Offender's Misconduct Appeal Form, # DCCC-96-344, stamped received Dec. 12, 1996; and Pl.Ex. Administrative Action, Appeal No. 96-344.) Plaintiff filed this civil rights action on January 21, 1997.

ANALYSIS

As a preliminary matter, the Court notes that "a state prisoner's claim for damages is not cognizable under § 1983 if a judgment in favor of the prisoner would necessarily imply the invalidity of his conviction or sentence, unless the prisoner can demonstrate that the conviction or sentence has previously been invalidated." Edwards v. Balisok, 117 S.Ct. 1584, 1588 (1997) (quoting Heck v. Humphrey, 114 S.Ct. 2364, 2372-2373 (1994)); see also Sheldon v. Hundley, 83 F.3d 231, 233 (8th Cir. 1996) (inmate could not bring § 1983 action until he had disciplinary action invalidated). In Edwards, the Supreme Court stated that in a prison disciplinary hearing where the claim alleged deceit and bias on the part of the hearing officer, a prisoner's claim necessarily implied invalidity of the deprivation of his good-time credits, and therefore, was not cognizable under § 1983.

Applying the Heck standard to this case, in order for Plaintiff Ross to bring his § 1983 claim, which would necessarily "imply the invalidity of the punishment imposed," Ross must first demonstrate that the disciplinary hearing decision has previously been invalidated. Heck, 114 S.Ct. at 2372. In other words, Ross "must prove that the conviction or sentence has been reversed on

direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254." Id. Ross has presented no evidence of such a determination to this Court.

Notwithstanding, in this action Plaintiff requests, among other things, "expungement or ten thousand ($10,000) dollars as compensation for the deprivation of my liberty interest." (#1, p. 5). The Court liberally construes Plaintiff's request for "expungement" as a request for the Court to restore his lost earned credits and expunge the misconduct report/findings. Such request lies in habeas because it challenges the length or duration of his confinement. Preiser v. Rodriguez, 411 U.S. 475, 487-490 (1973); Smith v. Maschner, 899 F.2d 940 (10th Cir. 1990). Plaintiff's action is in essence a request for a writ of habeas corpus under 28 U.S.C. § 2254. Therefore, given Plaintiff's pro se status, the Court liberally construes Plaintiff's § 1983 complaint as a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. See Haines, 404 U.S. at 520-21.

Section 2254(b)(1) requires a petitioner to exhaust state remedies before seeking habeas relief unless it would be futile to do so. The United States Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 501 U.S. 722, 731 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

Furthermore, the Oklahoma Court of Criminal Appeals has held that "an inmate has the writ of mandamus to force prison officials to insure due process within the Department of Corrections' disciplinary system and to force prison officials to provide for procedural due process . . . before revoking credits after they have been previously earned." Canady v. Reynolds, 880 P.2d 391, 397 (Okla.Crim.App. 1994).

In this case, there is no evidence that Plaintiff would be entitled to immediate release should the Court restore his lost earned credits, nor is there any indication that Plaintiff "has been denied relief in the state courts." Plaintiff has an available state court remedy, a petition for writ of mandamus. Id. The Court finds, therefore, that Plaintiff's application for writ of habeas corpus should be dismissed without prejudice for failure to exhaust state remedies.

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) The Magistrate's Report and Recommendation (#5) is **overruled as moot**.

(2) Plaintiff's action originally filed under 42 U.S.C. § 1983 is **treated** as a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

(3) Plaintiff's application for writ of habeas corpus is **dismissed without prejudice** for failure to exhaust state remedies.

IT IS SO ORDERED THIS 18 day of July, 1997.

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

7-18-97

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LAWRENCE TROMBKA, Plaintiff, v. CHURCH OF SCIENTOLOGY INTERNATIONAL, a foreign corporation, and CITIZENS COMMISSION ON HUMAN RIGHTS, a foreign corporation, Defendants.	)	Court No: 97-C-596-K Defendants do not object

FILED
JUL 18 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER FOR ADMINISTRATIVE CLOSURE

This matter is hereby administratively closed until September 15, 1997, at which time Plaintiff shall either file a dismissal with prejudice or a request to reopen.

DONE THIS 18 DAY OF JULY, 1997.

Hon. Judge Kern, District Court Judge

TROMBKA/ADMIN CLOSE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JASON DOUGLAS FULTON,

Plaintiff,

vs.

RICHARD CLARK, et al.,

Defendants.

Case No.97-CV-98-H

REPORT AND RECOMMENDATION

In accordance with 28 U.S.C. §1915(a), as amended by the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996), the Court issued an Order directing Plaintiff to pay an initial partial filing fee of $4.00, to be paid by July 7, 1997. Plaintiff was advised that unless he either: (1) paid the initial partial filing fee, or (2) showed cause in writing for the failure to pay, his action would be subject to dismissal without prejudice to refiling. [Dkt. 8].

To date, Plaintiff has not paid the partial filing fee or shown cause for his failure to pay. It is therefore the recommendation of the undersigned United States Magistrate Judge that Plaintiff's action be DISMISSED WITHOUT PREJUDICE for his failure to pay the partial filing fee.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and

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recommendation of the Magistrate Judge. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 16th day of July, 1997.

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DELORIS WEBSTER
SS#: 515-68-3796

Plaintiff,

v.

JOHN J. CALLAHAN,
Acting Commissioner of the
Social Security Administration,

Defendant.

No. 96-CV-447-J

JUDGMENT

This action has come before the Court for consideration and an Order affirming the Acting Commissioner's denial of benefits has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 16 day of July 1997.

Sam A. Joyner
United States Magistrate Judge

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DELORIS WEBSTER,
SSN: 515-68-3786

Plaintiff,

v.

JOHN J. CALLAHAN,
Acting Commissioner of the
Social Security Administration,[1/]

Defendant.

No. 96-CV-447-J

ORDER[2/]

Pursuant to 42 U.S.C. § 405(g), Plaintiff seeks review of the Acting Commissioner's decision denying Deloris Webster and Bradley Ringle an earlier effective date for the receipt of Retirement Insurance Benefits ("RIB") based on Jack Webster's earnings record. See Title II of the Social Security Act, 42 U.S.C. §§ 401-433. Plaintiff argues that because Defendant failed to amend Mr. Webster's claim for RIB benefits to add Mrs. Webster and Mr. Ringle, Defendant is estopped from denying Mrs. Webster and Mr. Ringle benefits from March 1989 (i.e., the date Mr. Webster began receiving RIB benefits). The Court does not agree. The decision of the Acting Commissioner is hereby **AFFIRMED**.

[1/] Effective March 1, 1997, President William J. Clinton appointed John J. Callahan to serve as Acting Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), John J. Callahan, Acting Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

[2/] This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

I. INTRODUCTION

Jack Webster was born on February 17, 1927. [R. at 23]. In 1988, Plaintiff worked as a constable in Texas. Plaintiff ran for and lost re-election in September 1988. During October 1988, Plaintiff took a trip to California. After his election defeat, Mr. Webster decided to retire. In late September 1988 or early November 1988, Mr. Webster filed an application for Retirement Insurance Benefits because he was about to turn 62 years old.

Mr. Webster applied for RIB benefit by telephone with the Angelton, Texas office of the Social Security Administration ("SSA"). Mr. Webster alleges that he received his written application for RIB benefits in the mail within 3-4 days after he applied by phone. Mr. Webster signed the application and he alleges that he immediately returned the application to the SSA. The application signed by Plaintiff indicated that he was not married. The application in the record is stamped received November 28, 1988. [R. at 35-38]. Plaintiff disputes the November 28, 1988 filing date. Mr. Webster testified that he thought the call to the SSA was right after his election defeat and before his trip to California, but he was not sure. This would place the call in late September 1988. However, Plaintiff also testified that the call was about three weeks before he was married on November 22, 1988. This would place the call in early November 1988. [R. at 24]. Plaintiff argues that the application had to be filed before November 28, 1988 because he indicated he was not married on the application and on November 28, 1988 he had been married for six days and he would not have stated that he was not married when he was. [R. at 27, 30]. The Court

finds, however, that the dispute over when Mr. Webster's original application was filed is not significant or determinative of this appeal. From the record, there is no question that Mr. Webster applied for RIB benefits sometime shortly before or after his marriage in November 1988.

Jack Webster and Deloris Ringle were married on November 22, 1988. [R. at 62-63]. At the time, Deloris Ringle had a minor child, Bradley Ringle, who became Jack Webster's step son when Ms. Ringle and Mr. Webster married. Shortly after his marriage in November 1988, Mr. Webster alleges that he called the SSA. It is the facts surrounding this phone call which form the basis of Plaintiff's estoppel argument.

Mr. Webster testified that he called the SSA to ask whether a step son would be entitled to death benefits if a step father were to die without adopting the step son. [R. at 64]. It appears as if the question may have been posed to the SSA as a hypothetical. In other words, there is no indication in the record that Mr. Webster actually told the SSA that he actually had a minor step son residing in his home.

Mr. Webster alleges that he did give the SSA his social security number and that he did tell the SSA employee taking his call that he had a pending claim for retirement benefits. Mr. Webster admits, however, that at the time he called to inquire about death benefits for a step son, he was unaware that his wife and step son would be entitled to RIB benefits based on his own earnings record. Thus, Mr. Webster did not, and would not have known to, inquire about RIB benefits for his new wife and step son.

At some point during his telephone conversation with the SSA, Mr. Webster mentioned that he was recently married. As a result, the SSA employee taking Mr. Webster's call asked him if he wanted the SSA to send a change of name card to his new wife. Mr. Webster said yes and he received the change of name card a few days later. [R. at 25-27, 29, 31, 35-38]. The card was not returned to the SSA by Mrs. Webster until July 1989. Mrs. Webster testified that she simply neglected to return the card until she was required to do so in order to apply for food stamps. Mrs. Webster was not sure, however, whether or not the card she returned was the card Mr. Webster had requested. [R. at 32].

Mr. Webster turned 62 on February 17, 1989. Mr. Webster's application for RIB benefits was approved in March 1989 and he began to receive RIB benefits. It was not until five years later that Mr. Webster learned that his wife and step son were also entitled to RIB benefits on his earnings record. Mr. Webster learned that his wife and step son would be eligible when he spoke to a step daughter from a previous marriage and she told him that her natural father's step son was receiving RIB benefits on her natural father's earnings record. Once he learned this information, Mr. Webster immediately filed an application for children's RIB benefits on March 16, 1994. [R. at 43-45]. Mrs. Webster also filed her own application for wife's benefits on March 16, 1994. [R. at 40-42].

Mrs. Webster's and her son's applications for RIB benefits based on Mr. Webster's earnings record were granted. Benefits were considered effective as of August 1993 (i.e., 6 months prior to the March 16, 1994 application). The SSA's

regulations allow children's and wife's RIB benefits to be paid retroactively for a maximum of six months, if the wife and/or child met the eligibility requirements for the six month period prior to the filing of an application for RIB benefits. See 20 C.F.R. § 404.603(b). Plaintiff challenged the effective date of benefits, arguing that Mrs. Webster and her son should be entitled to benefits from March 1989, when Mr. Webster first began receiving his RIB benefits.

The SSA denied Plaintiff's request. Plaintiff moved to reconsider and that request was denied. Plaintiff then requested a hearing before an administrative law judge ("ALJ"). The ALJ heard evidence and argument and issued a written opinion denying Plaintiff's request for an earlier effective date. Plaintiff appealed the ALJ's decision to the Appeals Council and the Appeals Council refused to review the ALJ's decision. The ALJ's decision, therefore, became the Acting Commissioner's final decision and Plaintiff filed this action challenging the ALJ's decision.[3/]

The ALJ found that the relevant statutes and regulations require a claimant to file an application in order to receive RIB benefits. The ALJ found that there was no objective evidence that prior to March 16, 1994, anyone ever made an overt attempt to apply for RIB benefits on behalf of Mrs. Webster and her son. The ALJ also found that the SSA would not be estopped from denying benefits for failure to file an application because the SSA did not misrepresent any facts during the November 1988

3/ Mr. Webster was the original Plaintiff in this action. Unfortunately, Mr. Webster died on August 3, 1996. Mrs. Webster filed a motion, which was granted, to be substituted as the Plaintiff in this action. See Doc. Nos. 9-12.

telephone call. The ALJ affirmed the prior decision to pay benefits as of August 1993 and denied the request for an earlier payment date. [R. at 11-12].

II. DISCUSSION

Plaintiff alleges that when Mr. Webster contacted the SSA on November 28, 1988, he did not know his wife and step son were entitled to RIB benefits. Plaintiff argues that because the SSA was aware that he had recently married and that he had a minor step son, the SSA had a duty to inform him that his wife and step son were entitled to benefits based on Mr. Webster's earnings record. Plaintiff argues that a filing date of November 28, 1988, and not March 16, 1994, should be used as the date of Mrs. Webster's and her son's application for RIB benefits. Plaintiff argues that because the SSA failed to inform Mr. Webster during the November 1988 telephone call that Mrs. Webster and her son would be eligible for RIB benefits on Mr. Webster's earnings record, the SSA is estopped from denying benefits to Mrs. Webster and her son based on a November 1988 application date.

To be entitled to RIB benefits, Mrs. Webster and her son were required by statute and SSA regulations to file a written application for benefits. See 42 U.S.C. §§ 402(b)(1)(A) and 402(d)(1)(A); and 20 C.F.R. §§ 404.303, 404.330(b), 404.350(a)(3), 404.603, 404.610, and 404.611. The filing of an application for RIB benefits protects a person's entitlement to those benefits for the six month period before the application was filed, if all of the other conditions for entitlement to benefits are met. 20 C.F.R. § 404.603(b). The SSA argues that Mrs. Webster and her son first became entitled to benefits when they satisfied the requirement for a written

application on March 16, 1994. The SSA argues that Mrs. Webster and her son are not entitled to benefits at any time prior to March 16, 1994 because no written application was on file prior to March 16, 1994 and the SSA cannot be estopped from enforcing the written application requirement.

A. THE UNITED STATES SUPREME COURT'S DETERMINATIVE DECISION IN *OFFICE OF PERSONNEL MANAGEMENT V. RICHMOND*

Under the facts of this case, Plaintiff's estoppel argument comes close to being frivolous in light of the United States Supreme Court's decision in Office of Personnel Management v. Richmond, 496 U.S. 414 (1990), which neither Plaintiff nor the Acting Commissioner cite in their briefs. In Richmond, the Court held unequivocally that the doctrine of equitable estoppel can never entitle a benefits claimant to a monetary payment from the United States Treasury not authorized by statute, even when a benefits claimant alleges that he lost or did not apply for benefits because of erroneous oral or written advice by a government employee. In other words, if the statute granting a particular benefit requires an application and an application is not filed, a claimant of that benefit is not entitled to benefits in the absence of an application, even if the claimant's failure to file an application is due to erroneous advice received from a government employee.

In Richmond, plaintiff worked for the government as a welder at the Navy Public Works Center in San Diego, California. During the course of his employment, plaintiff injured his eyes. In 1981, he left his job when the government approved his application for disability retirement. Disabled federal employees who have completed

five years of service are entitled to a disability annuity pursuant to 5 U.S.C. § 8337(a). At the time he quit working for the government, 5 U.S.C. § 8337(d) provided that disability benefits would end if, for two consecutive years, a disabled worker earned wages equal to 80% of the wages he earned when he left government service. Section 8337(d) was amended in 1982 to change the measuring period from two years to one year. Richmond, 496 U.S. at 416.

From 1982 to 1985, plaintiff worked part time and earned less than 80% of his previous wages as a government employee. In 1986, plaintiff had an opportunity to take on extra work and the income from this extra work would put him over the 80% mark for 1986. Before accepting the extra work in 1986, plaintiff contacted a government employee and asked if he could take on the extra work in 1986 without losing his disability benefits. Relying on the pre-1982 version of § 8337(d), the government employee erroneously told plaintiff that he could because he would not be over the 80% mark for two consecutive years. Plaintiff took the work and in 1986 he earned more than 80% of his previous salary as a federal employee. Applying the post-1982 version of § 8337(d), with its one year limit, the government stopped plaintiff's disability benefits from June 30, 1987 to January 1, 1988. Richmond, 496 U.S. at 416-418.

Plaintiff filed a lawsuit and argued that due to the erroneous information he received from the government employee, the government was estopped from finding him ineligible for disability benefits. The United States Supreme Court did not agree. The Court began by holding that estoppel cannot be asserted against the government

to the same extent that it can be asserted against private litigants. It is "the duty of all courts to observe the conditions defined by Congress for charging the public treasury." Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 385 (1947). This existence of this Merrill duty is the main reason why a greater degree of misconduct by the government is required before estoppel may be invoked against the government. Mere negligence, delay, inaction, or failure to follow agency guidelines is not the type of conduct that can estop the government. Board of County Commissioners of Adams County v. Isaac, 18 F.3d 1492, 1499 (10th Cir. 1994); Home Savings and Loan Association of Lawton, Oklahoma v. Nimo, 695 F.2d 1251, 1253 (10th Cir. 1982); Schweiker v. Hansen, 450 U.S. 785, 788-89 (1981).; Richmond, 496 U.S. at 419. The depletion of the treasury would be too great if the government was estopped by every material misrepresentation made by any one if its many agents.

The Court in Richmond then proceeded to examine and discuss the Appropriations Clause of the Constitution.[4/] The Court held that the command of the Appropriations Clause was that the payment of money from the Treasury be authorized by statute and the government could not be compelled, through application of the doctrine of equitable estoppel or otherwise, to pay money not authorized by statute. Richmond, 496 U.S. at 424. The parties in this case do not dispute that a claimant of RIB benefits must file a written application to be entitled to RIB benefits and that neither Mrs. Webster nor her son filed a written application prior to March 16, 1994.

[4/] The Appropriations Clause states that: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. Art. I, § 9, cl. 7.

But for Plaintiff's claim of estoppel, the award of RIB benefits sought by Mrs. Webster and her son would be in direct conflict with the statute authorizing the payment of RIB benefits. Under the holding in Richmond, the doctrine of equitable estoppel cannot be used to require the Acting Commissioner to pay Mrs. Webster and/or her son benefits not authorized by statute. See, e.g., Downtown Medical Center v. Bowen, 944 F.2d 756, 771 (10th Cir. 1991) (holding that we cannot estop the Constitution and require benefit payments not authorized by statute).

The Court in Richmond offered several reasons why the doctrine of equitable estoppel cannot be used to compel the payment of money from the Treasury not authorized by statute. As an initial matter, the Court felt that the doctrine of equitable estoppel could not be used to override the Appropriations Clause of the Constitution. The Court was also concerned that application of the estoppel doctrine could render the Appropriations Clause a nullity.

> If agents of the Executive were able, by their unauthorized oral or written statements to citizens, to obligate the Treasury for the payment of funds, the control over public funds that the [Appropriations] Clause reposes in Congress in effect could be transferred to the Executive. If, for example, the President or Executive branch officials were displeased with a new restriction on benefits imposed by Congress to ease burdens on the fisc . . . and sought to evade them, agency officials could advise citizens that the restrictions were inapplicable. Estoppel would give the advice the practical force of law, in violation of the Constitution.

Richmond, 496 U.S. at 428.

The Court also felt that it was beyond reality to expect that the government will be able to

> 'secure perfect performance from its hundreds of thousands of employees scattered throughout the continent.' To open the door to estoppel claims would only invite endless litigation over both real and imagined claims of misinformation by disgruntled citizens, imposing an unpredictable drain on the public fisc. Even if most claims were rejected in the end, the burden of defending such estoppel claims would itself be substantial.

Richmond, 496 U.S. at 433 (internal citations omitted).

The Court was also skeptical of plaintiff's argument that application of the estoppel doctrine would ultimately produce more reliable advice form the government. The Court assumed with confidence

> that Government agents attempt conscientious performance of their duties and in most cases provide free and valuable information to those who seek advice about Government programs. A rule of estoppel might create not more reliable advice, but less advice. The natural consequence of a rule that made the Government liable for the statements of its agents would be a decision to cut back and impose strict controls upon Government provision of information in order to limit liability. Not only would valuable informational programs be lost to the public, but the greatest impact of this loss would fall on those of limited means, who can least afford the alternative of private advice.

Richmond, 496 U.S. at 433-34 (internal citations omitted).

B. THE UNITED STATES SUPREME COURT'S PRE-*RICHMOND* DECISION IN *SCHWEIKER V. HANSEN*

The parties did cite Schweiker v. Hansen, 450 U.S. 785 (1981) in their briefs. Hansen was decided nine years prior to Richmond. In its opinion in Hansen the Supreme Court admitted that it had never decided what type of conduct, if any, by a government employee would estop the government from insisting on compliance with valid regulations governing the distribution of benefits. From its previous decisions, however, the Court recognized that it had indicated, but not held, that at the very least there must be affirmative misconduct, and not mere negligence, by a government employee before the government would be estopped.

Even under the standard announced in Hansen, the Court finds Plaintiff's estoppel argument in this case to be without merit. Plaintiff argues that when Mr. Webster called the SSA in November 1988, the SSA employee taking the call should have told Mr. Webster, even without a specific inquiry about RIB benefits, that his new wife and step son would be entitled to RIB benefits on his earnings record because when he called he gave his social security, mentioned he was married, inquired about death benefits for step children, and mentioned that he had a pending claim for RIB benefits. At most, Plaintiff's arguments support a claim that the SSA was negligent in failing to put two and two together and inform Mr. Webster that his new wife and step son would be eligible for RIB benefits. Negligence is not sufficient to create an estoppel against the government. Isaac, 18 F.3d at 1499; Nimo, 695 F.2d at 1253; Hansen, 450 U.S. at 788-89; Richmond, 496 U.S. at 419.

In Hansen plaintiff met for 15 minutes with an SSA field representative in June 1974. Plaintiff asked the field representative if she was eligible for mother's insurance benefits. The field representative erroneously told plaintiff that she was not eligible for benefits and plaintiff left the SSA office without filing for benefits. Approximately one year later, Plaintiff filed an application in May 1975 after she learned that she was in fact eligible for mother's insurance benefits. Plaintiff's claim was granted and she was paid benefits based on her May 1975 application. Plaintiff argued that the she should have been paid benefits based on her June 1974 conversation with the SSA's field representative and that the SSA was estopped from arguing otherwise. Hansen, 450 U.S. at 786-87. The United States Supreme Court rejected plaintiff's argument, holding that it was not convinced that the field representative's mistake was the type of conduct that would estop the government under any standard. Hansen, 450 U.S. at 788-89.

If estoppel was not appropriate under the facts in Hansen, it is not appropriate under the facts in this case. In Hansen, plaintiff asked a specific question about specific benefits and was given an incorrect answer by the SSA field representative. This was not enough to create an estoppel. In this case, Mr. Webster never asked a specific question about RIB benefits for his new wife and step son and he was never given any incorrect information by an SSA employee.[5/] In short, the Court is not

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[5/] In fact, had Mr. Webster specifically inquired about RIB benefits for his new wife and step son at the time of the November 1988 phone call, the SSA employee would have been correct in telling him that they were not entitled to benefits at that time. Pursuant to the SSA's regulations, neither a wife nor a step son is entitled to RIB benefits on the husband/step father's earnings record unless they have been a wife or step son for at least one year prior to filing. 20 C.F.R. §§ 404.330(a)(1) and 404.350(a)(1). When Mr.

convinced that the SSA's conduct is the type of conduct that would estop the government from enforcing its valid requirement for a written application.

Plaintiff cites McDonald v. Schweiker, 537 F. Supp. 47 (N.D. Ind. 1981) and argues that this case is distinguishable from Hansen. In McDonald, plaintiff went to an SSA office and asked whether she would be eligible for RIB benefits when she turned 62. The SSA wrote her a letter and told her that she would not be eligible for RIB benefits at age 62 because she only had 21 calendar quarters of work and she needed 27 quarters. The SSA's computations were incorrect because plaintiff actually had 33 work quarters. Relying on the letter from the SSA, plaintiff did not apply for benefits when she turned 62. A year after she turned 62, plaintiff took her husband to the SSA office to apply for disability insurance benefits. During the husband's interview, the SSA routinely reviewed plaintiff's file and discovered its previous error. Plaintiff then filed an application for RIB benefits and was awarded benefits from the date of her application, not from the date when she turned 62. Plaintiff filed an appeal, arguing that the SSA was estopped from denying her benefits from the date she turned 62. McDonald, 537 F. Supp. at 48.

On appeal, the SSA argued that plaintiff's estoppel argument was precluded by the Supreme Court's holding in Hansen. The Court in McDonald disagreed, holding that the mistake by the field representative in Hansen was a mistake of law (i.e., the representative misinterpreted the law regarding Ms. Hansen's eligibility for benefits).

Webster called the SSA in November 1988, he had only been married for a few days.

The Court viewed the mistake in McDonald as a mistake of fact. According to the Court deciding McDonald, mistakes of law do not generate estoppels because a citizen dealing with the government is charged with knowledge of and is bound by statutes and lawfully promulgated regulations. In other words, the citizen need not rely on a government employee's advice because the citizen can look the law up for him or herself. McDonald, 537 F. Supp. at 50-51.

The Court viewed the mistake in McDonald as a mistake of fact. The Court found that the information regarding the number of quarters worked by plaintiff was in the exclusive control of the SSA and the computation of eligible quarters could only be made by the SSA . Therefore, the Court found that unlike the mistake of law situation in Hansen, the plaintiff could not protect her rights by independently verifying the SSA's information. The Court felt this was enough to distinguish Hansen and to justify application of the doctrine of equitable estoppel against the SSA. McDonald, 537 F. Supp. at 50-51.

McDonald was decided nine years before the Supreme Court's decision in Richmond. The Supreme Court's holding in Richmond makes it clear that estoppel can never be used to compel the government to pay money from the Treasury in violation of a statute. The Court's use of estoppel in McDonald is no longer valid after Richmond. Nevertheless, even if Richmond had not been decided, this Court is not persuaded that the holding in McDonald applies to the facts of this case.[6/]

[6/] The Court is also not convinced that the holding in McDonald was correct at the time it was decided. First, the Court in McDonald offered no explanation for its finding that plaintiff was incapable of

In support of the application of the McDonald holding to this case, Plaintiff makes the following argument:

> This case should be distinguished from Hansen because [Mr. Webster] had furnished a written application in 1988. [Mr. Webster's] conversation with the Social Security representative shortly after his marriage acted to supplement [Mr. Webster's] Application. The action of the Social Security Administration was a factual mistake as opposed to a legal mistake.

[Doc. No. 12, p. 4]. Plaintiff's argument begins with a faulty premise. Plaintiff argues that Mr. Webster's November 1988 phone call to the SSA should have resulted in an amendment to Mr. Webster's original application for RIB benefits. What Plaintiff fails to recognize, however, is that neither Mrs. Webster nor her son could have been eligible for benefits based on an "amendment" to Mr. Webster's application. Mrs. Webster and her son were required to file their own written applications. 42 U.S.C. §§ 402(b)(1)(A) and 402(d)(1)(A); and 20 C.F.R. §§ 404.303, 404.330(b), 404.350(a)(3), 404.603, 404.610, and 404.611.

Plaintiff has also failed to demonstrate what mistake of fact was made by the SSA employee in this case. The record demonstrates that Mr. Webster was not given any incorrect information, factual or legal. The mistake, if there was one, was that the SSA employee failed to piece together the information provided by Mr. Webster and

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verifying for herself the number of quarters she had worked. Second, the Supreme Court's decision in Hansen made no distinction between factual and legal mistakes. The Hansen decision explicitly relies on at least one lower court decision denying estoppel in a case involving a material factual error. Third, much of the advice given by SSA employees involves questions of fact and law. Trying to draw a clear distinction between the two could lead to wasteful litigation over the nature of the misstatement at issue. See Scime v. Bowen, 822 F.2d 7 (2nd Cir. 1987) and Eagle v. Sullivan, 877 F.2d 908 (11th Cir. 1989) (both rejecting the mistake of fact/ mistake of law dichotomy created in McDonald).

inform him that his new wife and step son might be entitled to RIB benefits based on his earnings record. This mistake about the eligibility of a claimant for a particular benefit is indistinguishable from the mistake made by the employee in Hansen and characterized by the Court in McDonald as a mistake of law, not a mistake of fact.

C. THE SOCIAL SECURITY ACT'S MISINFORMATION EXCEPTION TO THE APPLICATION REQUIREMENT

The Social Security Act provides one exception to 42 U.S.C. § 402's requirement that an application for RIB benefits be filed before a claimant is entitled to those benefits. Section 402(j)(5) provides as follows:

> In any case in which it is determined to the satisfaction of the Commissioner of Social Security that an individual failed as of any date to apply for monthly insurance benefits under this title by reason of misinformation provided to such individual by any officer or employee of the Social Security Administration relating to such individual's eligibility for benefits under this title, such individual shall be deemed to have applied for such benefits on the later of
>
> (A) the date on which such misinformation was provided to such individual, or
>
> (B) the date on which such individual met all requirements for entitlement to such benefits (other than application therefor).

42 U.S.C. § 402(j)(5). This statutory provision has been implemented by the Commissioner of Social Security through regulations. See 20 C.F.R. § 404.633. These regulations define the elements of a claim of misinformation as follows:

> (1) The misinformation must have been provided to you by one of our employees while he or she was acting in his or her official capacity as our employee. For

purposes of this section, an employee includes an officer of SSA.

(2) Misinformation is information which we consider to be incorrect, misleading, or incomplete in view of the facts which you gave to the employee, or of which the employee was aware or should have been aware, regarding your particular circumstances . . . . In addition, for us to find that the information you received was incomplete, the employee must have failed to provide you with the appropriate, additional information which he or she would be required to provide in carrying out his or her official duties.

(3) The misinformation may have been provided to you orally or in writing.

(4) The misinformation must have been provided to you in response to a specific request by you to us for information about your eligibility for benefits or the eligibility for benefits of [a person on whose behalf you are authorized to apply for benefits].

20 C.F.R. § 404.633(c). The regulations further provide, however, that the SSA will never find that it gave misinformation to a person based solely on that person's own statements. 20 C.F.R. § 404.633(d)(2).

Plaintiff does not cite or rely on 42 U.S. C. § 402(j)(5) or 20 C.F.R. § 404.633. Thus, Plaintiff has not demonstrated how she satisfies the elements of §§ 402(j)(5) and 404.633. There is nothing in the record before the Court regarding the alleged "misinformation" in this case other than Mr. Webster's own statements/testimony. Thus, 42 U.S.C. § 402(j)(5), as implemented by 20 C.F.R. § 404.633, is not applicable. Even if it were, the Court is not persuaded that Mr. Webster received any "misinformation" from the SSA employee he spoke with in November 1988.

As discussed above, there is nothing in the record to suggest that the SSA employee gave Mr. Webster any incorrect or misleading information. In fact, all Plaintiff alleges is that the SSA employee failed to provide any information about RIB benefits. Thus, the only applicable definition in § 404.633(c)(2) of "misinformation" is information that was "incomplete in view of the facts which [Mr. Webster] gave to the employee, or of which the employee was aware or should have been aware, regarding [Mr. Webster's] particular circumstances." In addition, the incomplete information must have been provided to Mr. Webster in response to a specific request by Mr. Webster for information about his eligibility or the eligibility of other persons for benefits. 20 C.F.R. § 404.633(c)(4).

Mr. Webster admits that he never requested any information from the SSA about his new wife's and/or step son's eligibility for RIB benefits. The only benefits Mr. Webster inquired about were death benefits for a step son. There could, therefore, have been no misinformation provided to Mr. Webster in response to a specific request by him for information about RIB benefits. The Court also finds that the information provided to Mr. Webster by the SSA employee was not incomplete in light of the facts given her by Mr. Webster. Mr. Webster called seeking information about death benefits, not RIB benefits. The employee correctly and completely answered those questions. The SSA employee gave Mr. Webster no information about RIB benefits, let alone incomplete information. Thus, § 402(j)(5), as implemented by 20 C.F.R. § 404.633, does not apply in this case.

CONCLUSION

The doctrine of equitable estoppel cannot be applied in this case to excuse Mrs. Webster's and her son's failure to file a written application for Retirement Insurance Benefits prior to March 16, 1994. The misinformation exception to the written application requirement found in 42 U.S.C. § 402(j)(5) and 20 C.F.R. § 404.633 is not applicable under the facts of this case. The Acting Commissioner's decision is, therefore, **AFFIRMED** and a separate Judgment will be entered against Plaintiff.

It is so ORDERED this 16 day of July 1997.

Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MELZENIA HAWKINS,

Plaintiff,

v.

JOHN L. CALLAHAN, COMMISSIONER OF SOCIAL SECURITY,[1]

Defendant.

Case No. 93-C-570-W

ORDER AND JUDGMENT

This case is remanded to the Commissioner of Social Security for further proceedings in accordance with the Tenth Circuit Court of Appeals' Order and Judgment, attached hereto.

Dated this 15th day of July, 1997.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:\orders\judg.rem2

[1]Effective March 1, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), John J. Callahan is substituted for Shirley S. Chater, Commissioner of Social Security, as the Defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

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COPY

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MELZENIA HAWKINS,

Plaintiff - Appellant,

v.

SHIRLEY S. CHATER, Commissioner, Social Security Administration,

Defendant - Appellee.

No. 96-5110
D.C. No. 93-CV-570-W

JUDGMENT

Filed May 13, 1997

Before **TACHA**, **EBEL**, and **BRISCOE**, Circuit Judges.

This case originated in the Northern District of Oklahoma and was submitted on the briefs at the direction of the court.

The judgment of that court is affirmed in part and reversed in part. The case is remanded to the United States District Court for the Northern District of Oklahoma forfurther proceedings in accordance with the opinion of this court.

A true copy

Teste

Patrick Fisher
Clerk, U. S. Court of Appeals, Tenth Circuit

By: _____
Deputy Clerk

Entered for the Court
PATRICK FISHER, Clerk

by: _____
Deputy Clerk

C/m98

FILED
United States Court of Appeals
Tenth Circuit

MAY 13 1997

PATRICK FISHER
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MELZENIA HAWKINS,

Plaintiff-Appellant,

v.

SHIRLEY S. CHATER,
Commissioner, Social Security
Administration,*

Defendant-Appellee.

No. 96-5110

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 93-C-570-W)

Submitted on the briefs:

Paul F. McTighe, Jr. (Gayle L. Troutman with him on the brief), Tulsa, Oklahoma, for Plaintiff-Appellant.

Stephen C. Lewis, United States Attorney, Joseph B. Liken, Acting Chief Counsel, Region VI, Linda H. Green, Assistant Regional Counsel, Office of the

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* Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. The Commissioner has been substituted for the Secretary in the caption, in the text, however, we continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

General Counsel, U.S. Social Security Administration, Dallas, Texas, for Defendant-Appellee.

Before TACHA, EBEL, and BRISCOE, Circuit Judges.

EBEL, Circuit Judge.

Claimant Melzenia Hawkins appeals from a district court order affirming the Secretary's decision to deny her application for social security disability benefits.[1] We review the Secretary's decision on the entire record "to determine whether the findings are supported by substantial evidence and whether the Secretary applied correct legal standards." Pacheco v. Sullivan, 931 F.2d 695, 696 (10th Cir. 1991).

Claimant alleges disability because of hypertension, arthritis, and depression.[2] Employing the Secretary's five-step evaluative sequence, see

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[1] After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f) and 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

[2] Claimant's application for disability benefits did not list depression as a cause of her disability. See R. Vol. II at 105. Because the evidence claimant submitted to the administrative law judge, however, showed a history of

(continued...)

Williams v. Bowen, 844 F.2d 748, 750-72 (10th Cir. 1988), the administrative law judge (ALJ) found claimant's impairments nonsevere, see 20 C.F.R. § 404.1521, and concluded at step two that claimant was not disabled, see 20 C.F.R. § 404.1520(c). Claimant challenges that determination as unsupported by substantial evidence in the record as a whole, arguing in particular that the ALJ failed in his duty to develop the record when he refused to order consultative physical and mental examinations of claimant.

It is beyond dispute that the burden to prove disability in a social security case is on the claimant. See Hill v. Sullivan, 924 F.2d 972, 974 (10th Cir. 1991). However, unlike the typical judicial proceeding, a social security disability hearing is nonadversarial, see Dixon v. Heckler, 811 F.2d 506, 510 (10th Cir. 1987), with the ALJ responsible in every case "to ensure that an adequate record is developed during the disability hearing consistent with the issues raised," Henrie v. United States Dep't of Health & Human Servs., 13 F.3d 359, 360-61 (10th Cir. 1993); 20 C.F.R. § 404.944 (requiring the ALJ to "look[] fully into the issues"); see also Heckler v. Campbell, 461 U.S. 458, 471 n.1 (1983) (Brennan, J. concurring) (describing duty as one of inquiry, requiring the decision maker "to

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[2](...continued)
prescriptions for anti-depressant medication, and because claimant testified that she was depressed, we consider the issue of depression to have been properly before the ALJ. See Carter v. Chater, 73 F.3d 1019, 1021-22 (10th Cir. 1996).

inform himself about facts relevant to his decision and to learn the claimant's own version of those facts"); cf. Social Security Ruling 96-7p at n.3 (assigning to the adjudicator the task of developing "evidence regarding the possibility of a medically determinable mental impairment when the record contains information to suggest that such an impairment exists"); Social Security Ruling 82-62 (requiring the ALJ to develop and fully explain issue of whether a claimant retains the functional capacity to perform past work).

Against this background, claimant first argues that the ALJ should have ordered a consultative mental examination based on the evidence in the record of her depression. The record reveals the following evidence regarding claimant's depression: In April 1990, Dr. Alexander, claimant's treating physician in California, noted in a treatment log that claimant had "been depressed" and that he had prescribed Pamelor for nerves and depression. See R. Vol. II at 27. Subsequent notes from Dr. Alexander indicate that claimant continued to take Pamelor at least through May 1991, see id. at 27-28. The record contains no objective medical test results to verify claimant's depression.

The next mention of anything related to depression is a letter from Dr. Reed, a physician who treated claimant after she moved to Oklahoma from California, and who stated that "She was given Prosac [sic]." Id. at 34. Again, no test results appear in the record to confirm depression. Claimant and her sister

both testified at the hearing the claimant was depressed, see id. at 90, 98, and an agency interviewer noted that claimant "looked" depressed. There is no evidence that the agency interviewer was qualified to diagnose depression.

In rejecting claimant's allegation of disabling depression, the ALJ discounted her use of anti-depressant medication. He noted that one of the treating physicians who had given her anti-depressants was a family practitioner/OB-GYN and that the other physician, Dr. Reed, was an internist who "obligingly" gave her medication. See R. Vol. II at 51. He noted that neither physician reported objective findings or referred claimant to a mental health specialist. See id. He refused to credit claimant's subjective complaints of depression.

We need not decide whether the evidence outlined above relating to claimant's mental state would be sufficient to justify a remand for further development of the record because here there is a further opinion from Dr. Toner, a psychiatrist, dated January 10, 1991, who completed a psychiatric review technique form and was of the opinion that claimant had no medically determinable impairment. See id. at 169. Dr. Toner specifically stated that claimant suffers from "no medically determinable MI [mental impairment]," id. at 170, and that there was no indication of significant functional limitations on the basis of psychological problems, see id.

Although the ALJ inexplicably did not mention this report in his decision, the report is substantial evidence supporting the conclusion that claimant does not suffer from a severe mental impairment. Its presence in the record, coupled with the absence of any objective medical findings regarding claimant's alleged depression, justifies the ALJ's decision to discredit claimant's testimony and the fact of her use of prescribed anti-depressants. Given this state of the record, the ALJ was not required to order further psychological examination.

We turn now to claimant's medical history regarding her hypertension and chest pain. Claimant apparently began the social security disability application process in California, but her file was lost by the agency. See R. Vol. II at 109. What evidence does remain of claimant's medical history in California reveals that, in October 1990, under the treatment of Dr. Ridgill, claimant underwent an EKG which was reported as abnormal, see id. at 185, presumably because of nonspecific ST-T wave changes.[3] Dr. Ridgill's assessment at that time was hypertension with possible coronary artery disease. See id. The record of Dr. Ridgill's examination states the following:

> "ELECTROCARDIOGRAM READING:
>
> Normal sinus rhythm. Nonspecific STT changes. Mostly in the inferior leads and anterior leads changes are noted.

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[3] There is no evidence in the record regarding what "nonspecific STT changes" mean or what they indicate in terms of heart function.

INTERPRETATION: Rule out ischemic heart disease."

See id. at 183. Although the ALJ did not comment on or attempt to interpret the significance of this notation, the Secretary cites this portion of the record to mean "ischemic heart disease was ruled out." See Appellee's Br. at 15 (emphasis added). In light of the entire record, however, we do not view Dr. Ridgill's ambiguous statement, "rule out ischemic heart disease," as supportive of the conclusion that such disease "had been ruled out." Rather, we believe that Dr. Ridgill was of the opinion that further testing would need to be done in order to rule out the possibility of ischemic heart disease. This interpretation is the only consistent one because Dr. Ridgill then proceeded to order further tests, specifically a treadmill exam. If Dr. Ridgill had already ruled out ischemic heart disease, such further testing would presumably have been unnecessary.

Despite the abnormal EKG, Dr. Ridgill was then of the opinion that claimant had no impairment-related physical limitations, see id. at 186, but that a treadmill exam was necessary for further diagnosis, see id. at 183. On two separate occasions claimant attempted to complete the treadmill test, but was unable to do so because her blood pressure was too high. See id. at 114, 145. No further tests were done to pinpoint claimant's cardiac problems.[4]

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[4] In addition to the 1990 EKG result, there is a further notation in the record from Dr. Rose Taylor, in conjunction with her residual functional capacity (continued...)

Sometime during the summer of 1991, claimant apparently moved to Oklahoma, where she was seen twice by Dr. Reed. On December 19, 1991, claimant again submitted to an EKG. While claimant's blood pressure at the time of the test was 130/70, the EKG was again abnormal. The report indicated that anteroseptal myocardial infarction could not be ruled out; that ST & T wave abnormality was again present; and that claimant had possible inferior ischemia. See id. at 35. Claimant was given Procardia and nitroglycerin ointment. There are no further tests in the record regarding claimant's heart condition.

The ALJ rejected claimant's contention that her heart condition constituted a severe impairment, concluding that the diagnoses of her two treating physicians were unsupported by objective medical evidence, see R. Vol. II at 50, and that claimant had failed to provide any other medical evidence to support her claim.

The difficult issue presented here, where the charge is that the ALJ has failed to develop the record by not obtaining a consultative examination, is to decide what quantum of evidence a claimant must establish of a disabling impairment or combination of impairments before the ALJ will be required to

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[4](...continued)
assessment, that claimant's EKG revealed something reacting in the poor category. R. Vol. II at 161. The writing is illegible, and so it is impossible to determine what part of claimant's EKG was "poor." A later illegible notation by a different physician also notes something "very poor" with regard to claimant's EKG. See id. at 178.

look further. We begin by acknowledging that the Secretary has broad latitude in ordering consultative examinations. See Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 778 (10th Cir. 1990). Nevertheless, it is clear that, where there is a direct conflict in the medical evidence requiring resolution, see 20 C.F.R. § 404.1519a(b)(4), or where the medical evidence in the record is inconclusive, see Thompson v. Sullivan, 987 F.2d 1482, 1491 (10th Cir. 1993), a consultative examination is often required for proper resolution of a disability claim. Similarly, where additional tests are required to explain a diagnosis already contained in the record, resort to a consultative examination may be necessary.[5]

That these specific instances may require the use of consultative examinations is supported by agency regulations. Subsection (f) of § 404.1512 provides:

> (f) *Need for consultative examination.* If the information we need is not readily available from the records of your medical treatment source, or we are unable to seek clarification from your medical source, we will ask you to attend one or more consultative examinations at our expense.

20 C.F.R. § 404.1512(f). 20 C.F.R. § 404.1519a further provides:

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[5] We are not confronted here with a situation where evidence already exists, and the ALJ must simply take the appropriate steps to acquire it. See, e.g., Carter v. Chater, 73 F.3d 1019, 1022 (10th Cir. 1996); Baker v. Bowen, 886 F.2d 289, 292 (10th Cir. 1989).

(a)(1)(General). The decision to purchase a consultative examination for you will be made after we have given full consideration to whether the additional information needed (e.g., clinical findings, laboratory tests, diagnosis, and prognosis) is readily available from the records of your medical sources. . . . Before purchasing a consultative examination, we will consider not only existing medical reports, but also the disability interview form containing your allegations as well as other pertinent evidence in your file.

(2)When we purchase a consultative examination, we will use the report from the consultative examination to try to resolve a conflict or ambiguity if one exists. We will also use a consultative examination to secure needed medical evidence the file does not contain such as clinical findings, laboratory tests, a diagnosis or prognosis necessary for decision.

(b) *Situations requiring a consultative examination.* A consultative examination may be purchased when the evidence as a whole, both medical and nonmedical, is not sufficient to support a decision on your claim. Other situations, including but not limited to the situations listed below, will normally require a consultative examination:

(1) The additional evidence needed is not contained in the records of your medical sources;

(2) The evidence that may have been available from your treating or other medical sources cannot be obtained for reasons beyond your control, such as death or noncooperation of a medical source;

(3) Highly technical or specialized medical evidence that we need is not available from your treating or other medical sources;

(4) A conflict, inconsistency, ambiguity or insufficiency in the evidence must be resolved, as we are unable to do so by recontacting your medical source; or

(5) There is an indication of a change in your condition that is likely to affect your ability to work, but the current severity of your impairment is not established.

see also 20 C.F.R. § 416.919a; Standards for Consultative Examinations and Existing Medical Evidence, 56 Fed. Reg. 36,932, 36,941 (1991).

As is usual in the law, the extreme cases are easy to decide; the cases that fit clearly within the framework of the regulations give us little pause. The difficult cases are those where there is *some* evidence in the record or *some* allegation by a claimant of a possibly disabling condition, but that evidence, by itself, is less than compelling. How much evidence must a claimant adduce in order to raise an issue requiring further investigation? Our review of the cases and the regulations leads us to conclude that the starting place must be the presence of some objective evidence in the record suggesting the existence of a condition which could have a material impact on the disability decision requiring further investigation. See Diaz, 898 F.2d at 777 (refusing to remand for consultative examination where claimant had failed to present "objective evidence supporting the conclusion that he suffers from depression"). Isolated and unsupported comments by the claimant are insufficient, by themselves, to raise the suspicion of the existence of a nonexertional impairment. See Brock v. Chater, 84 F.3d 726, 728 (5th Cir. 1996).

Ordinarily, the claimant must in some fashion raise the issue sought to be developed, see Henrie, 13 F.3d at 360-61, which, on its face, must be substantial, see Heggarty v. Sullivan, 947 F.2d 990, 997 (1st Cir. 1991). Specifically, the claimant has the burden to make sure there is, in the record, evidence sufficient to suggest a reasonable possibility that a severe impairment exists. When the claimant has satisfied his or her burden in that regard, it then, and only then, becomes the responsibility of the ALJ to order a consultative examination if such an examination is necessary or helpful to resolve the issue of impairment.

Further, when the claimant is represented by counsel at the administrative hearing, the ALJ should ordinarily be entitled to rely on the claimant's counsel to structure and present claimant's case in a way that the claimant's claims are adequately explored. Thus, in a counseled case, the ALJ may ordinarily require counsel to identify the issue or issues requiring further development. See Glass v. Shalala, 43 F.3d 1392, 1394-96 (10th Cir. 1994) (refusing to remand for further development of the record where the ALJ had carefully explored the applicant's claims and where counsel representing claimant failed to specify the additional information sought). In the absence of such a request by counsel, we will not impose a duty on the ALJ to order a consultative examination unless the need for one is clearly established in the record.

The ALJ does not have to exhaust every possible line of inquiry in an attempt to pursue every potential line of questioning. See Glass, 43 F.3d at 1396. The standard is one of reasonable good judgment. The duty to develop the record is limited to "fully and fairly develop[ing] the record as to material issues." Baca v. Department of Health & Human Servs., 5 F.3d 476, 479-80 (10th Cir. 1993).

This standard is consistent with our holding in Henrie, 13 F.3d 359. There, in a case decided at step four and involving the development of the record regarding the specifics of a represented claimant's past relevant work, we remanded for additional development of facts relating to the stress level involved in the claimant's former work as a negative stripper. See id. at 360-61. We noted that the ALJ must develop the record "consistent with the issues raised," id., even when a claimant is represented by counsel. See also Thompson, 987 F.2d at 1491-93 (ordering a consultative examination where medical record was inconclusive); Baca, 5 F.3d at 479-80 (remanding for further development of "material" issues raised by the record).

We also note that our standard is consistent with that in other circuits which have discussed the issue of an ALJ's duty to order a consultative examination. In Brock, 84 F.3d 726, the claimant had written a post-hearing letter to the ALJ alleging, for the first time, that he suffered from depression and the effects of past drug abuse and arguing that he should have received a

consultative examination. The court stated that "[a] consultative evaluation becomes 'necessary' only when the claimant presents evidence sufficient to raise a suspicion concerning a non-exertional impairment." Id. at 728. Because the claimant's allegation was viewed as an unsupported and isolated comment, it was insufficient to raise the suspicion of a non-exertional impairment, and no remand was ordered.

In Cannon v. Harris, 651 F.2d 513 (7th Cir. 1981), the Seventh Circuit reviewed the case of a claimant who did not specifically allege alcoholism as a cause of her disability. Nevertheless, because of evidence elicited during the administrative hearing, the court held that, although insufficient by itself to support a finding of disability, the evidence of the claimant's alcohol use "was sufficient to raise an issue as to plaintiff's mental and psychological capacity to engage in substantial gainful activity," id. at 519, thus requiring a remand for further development of the record.

The Fourth Circuit has remanded where claimant was able to show that "the Secretary's decision 'might reasonably have been different had [evidence been developed, inter alia, regarding IQ tests and psychological tests] . . . when (her) decision was rendered." Sims v. Harris, 631 F.2d 26, 28 (4th Cir. 1980) (quoting King v. Califano, 599 F.2d 597, 599 (4th Cir. 1979)).

In Currier v. Secretary of Health, Education & Welfare, 612 F.2d 594 (1st Cir. 1980), the claimant had been discharged by the Air Force because of mental problems and had been given a one hundred percent disability from the VA. He had been fired by his civilian employer as nonemployable, and there was evidence in the record that he had "a non-trivial psychiatric condition." Id. at 598. The ALJ's reliance on conclusory notes from a VA doctor was found to be an inadequate development of the record. The court stated:

> In most instances, where appellant himself fails to establish a sufficient claim of disability, the Secretary need proceed no further. Due to the non-adversarial nature of disability determination proceedings, however, the Secretary has recognized that she has certain responsibilities with regard to the development of the evidence, and we believe this responsibility increases in cases where the appellant is unrepresented, where the claim itself seems on its face to be substantial, where there are gaps in the evidence necessary to a reasoned evaluation of the claim, and where it is within the power of the administrative law judge, without undue effort, to see that the gaps are somewhat filled as by ordering easily obtained further or more complete reports or requesting further assistance from a social worker or psychiatrist or key witness. We emphasize that we do not see such responsibilities arising in run of the mill cases, but here appellant seems obviously mentally impaired to some degree . . . .

Id. at 598 (citations omitted). See also Morgan v. Sullivan, 945 F.2d 1079, 1082 (9th Cir. 1991) (remanding for development of evidence regarding onset date of claimant's mental problems where record was ambiguous).

While there are some cases requiring a stricter showing by a claimant asserting a claim of failure to develop the record, we view those cases as distinguishable because, for the most part, they involve a claim that the ALJ failed to obtain existing medical records that the claimant later argues would have established disability. For example, Shannon v. Chater, 54 F.3d 484, 488 (8th Cir. 1995), involved claims that the ALJ, on his own initiative, had failed to obtain existing evidence. The court there required the claimant to prove prejudice by establishing that the missing evidence would have been important in resolving the claim before finding reversible error.

However, there is a difference between a claimant who argues that he or she should have been afforded a consultative examination, and a claimant who argues that there was already evidence in existence that the ALJ failed to uncover or procure. Where evidence is already in existence at the time of the administrative hearing, it may be appropriate to require the stricter showing exemplified in Shannon, 54 F.3d 484. It would not be reasonable, however, to expect a claimant to demonstrate that evidence from a consultative examination, which has yet to be administered, would necessarily be dispositive. As stated earlier, the ALJ should order a consultative exam when evidence in the record establishes the reasonable possibility of the existence of a disability and the result

of the consultative exam could reasonably be expected to be of material assistance in resolving the issue of disability.

On the record before us, we hold that claimant has presented sufficient medical evidence to warrant further investigation of her physical condition as it relates to her claim of disabling hypertension and chest pain. Although the ALJ stated that "Dr. Reed recorded no objective evidence of any impairment . . . and the only laboratory data he secured was an electrocardiogram which revealed nonspecific ST-T wave changes," see R. Vol. II at 50, as we have discussed above, Dr. Reed's EKG revealed more than that. His opinion that claimant may suffer from possible inferior ischemia, id. at 34, and the EKG report itself which stated that anteroseptal myocardial infarction could not be ruled out and that abnormal ST & T waves were present, see id. at 35, should have alerted the ALJ to the need for more testing, particularly with a claimant who had already had one abnormal EKG and had earlier, on two separate occasions, been unable to take a further treadmill exam because of high blood pressure.[6]

---

[6] Although claimant's counsel at the outset of the hearing made a general suggestion that "new physical evidence" might be developed if the ALJ were to order psychiatric and physical examinations, see R. Vol. II at 76, that statement was so general and generic as to provide very little additional reason for the ALJ to order an examination of claimant's hypertension and heart problems.

In order to meet the burden of proof at step two, a claimant must demonstrate an impairment or combination of impairments that significantly limits the claimant's ability to do basic work activity. See 20 C.F.R. § 404.1520(c). A claimant's showing at level two that he or she has a severe impairment has been described as "de minimis." Williams, 844 F.2d at 751. Even under that nondemanding standard, however, we cannot say on the basis of this record whether claimant's impairment is severe or not severe without more medical information. On remand, the ALJ should further develop the record to determine the extent of claimant's hypertension and related heart problems and their impact on her ability to do work related activity. We note, for purposes of this limited remand, that substantial evidence supports the ALJ's determination that claimant's arthritis does not render her disabled, and we repeat our conclusion that the ALJ did not err in refusing to order a consultative mental examination of claimant.

The judgment of the United States District Court for the Northern District of Oklahoma is AFFIRMED in part and REVERSED in part, and this case is REMANDED for further proceedings in accordance with this opinion.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, v. SUPERIOR TESTING, INC., ERNIE C. BUSBY, and SHARON BUSBY, Defendants.	)	CASE NO. 96-CV-594-BU

ENTERED ON DOCKET
DATE 7-17-97

STIPULATED JUDGMENT

It is hereby stipulated and agreed as follows:

1. The United States of America is granted judgment against Ernie Busby and Sharon Busby for the total amount of $280,467.09, plus interest accruing pursuant to law after January 1, 1997;

2. Superior Testing, Inc., is the nominee of Ernie and Sharon Busby;

3. With the exception of $8,686.73, this judgment is nondischargeable in bankruptcy.

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7-17-97

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

VALLEY FORGE INSURANCE COMPANY and LUTHERAN BENEVOLENT INSURANCE EXCHANGE,	)	
Plaintiffs,	)	
vs.	)	No. 96-CV-1172 K
MORRIS DALE VANDERFORD; CATHOLIC DIOCESE OF TULSA; SAINT CECILIA CATHOLIC CHURCH; and GLENN ANDREW PRATER,	)	
Defendants.	)	

FILED

JUL 15 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

AGREED JUDGMENT
BETWEEN
VALLEY FORGE INSURANCE COMPANY,
LUTHERAN BENEVOLENT INSURANCE COMPANY,
ST. CECILIA CATHOLIC CHURCH, AND CATHOLIC DIOCESE OF TULSA

This matter comes on for hearing this 15 day of July, 1997, and the Court being fully advised finds that Judgment should be entered for the Plaintiffs.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of Plaintiffs and that the relief requested in Plaintiffs' Complaint is hereby granted; that Plaintiffs, Valley Forge Insurance Company and Jay Angoff, Director of the Missouri Department of Insurance, as Liquidator of Lutheran Benevolent Insurance Exchange owe no duty to indemnify or defend Morris Dale Vanderford for the acts, damages or claims alleged in Civil Action No. CJ-95-418 styled Glenn Andrew Prater, Plaintiff, vs. Saint Cecilia Catholic Church, Catholic Diocese of Tulsa, and Morris Dale Vanderford, or for any acts, omissions or damages arising out of the incidents giving rise to said lawsuit.

IT IS FURTHER ORDERED that this Judgment is without prejudice to and does not adjudicate the rights or obligations of the Plaintiff to any party to these

proceedings except as specifically adjudicated with respect to the Defendant Morris Dale Vanderford.

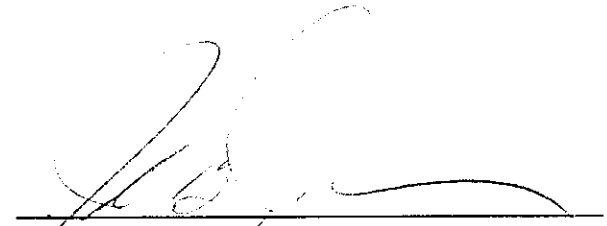
Judgment rendered this 15 day of July, 1997.

Judge of the United States
District Court for the Northern
District of Oklahoma

APPROVED:

Gerald P. Green, OBA #003563
E. Marissa Lane, OBA #013314
PIERCE COUCH HENDRICKSON
BAYSINGER & GREEN
P.O. Box 26350
Oklahoma City, Oklahoma 73126
405/235-1611

ATTORNEYS FOR PLAINTIFFS, VALLEY FORGE INSURANCE COMPANY and LUTHERAN BENEVOLENT INSURANCE COMPANY



John B. Jarboe, OBA #4627
JARBOE & STOERMER, P.C.
401 South Boston, 18th Floor
Mid Continent Tower, Suite 1810
Tulsa, Oklahoma 74103-4018

ATTORNEYS FOR DEFENDANTS, ST. CECILIA CATHOLIC CHURCH and CATHOLIC DIOCESE OF TULSA, OK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 15 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ERIC V. HATCHER

Plaintiff,

v.

FEDERAL EXPRESS CORPORATION,

Defendant.

CIVIL ACTION NO. 96-C-1032-C

ENTERED ON DOCKET
DATE JUL 17 1997

JOINT STIPULATION OF DISMISSAL

NOW COME Plaintiff Eric V. Hatcher and Defendant Federal Express Corporation, by and through their attorneys, pursuant to the provisions of Rule 41 of the Federal Rules of Civil Procedure, and hereby stipulate that this suit be dismissed in its entirety, with prejudice. It is further stipulated that each party shall bear its own costs and attorneys' fees.

Dated: July 10, 1997

Eric V. Hatcher
Eric V. Hatcher, Plaintiff Pro Se

Subscribed and Sworn To Before Me
This 10 day of July, 1997.

Notary Public

My commission expires Sept. 18, 1999.

BY:
Rose L. Jagust
Attorney for Defendant
KAPLAN, BEGY & VON OHLEN
One First National Plaza, 51st Floor
Chicago, Illinois 60603

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
on behalf of the Secretary of Veterans Affairs,

Plaintiff,

v.

MICHAEL SHUE DECORTE;
GLORIA L. DECORTE fka Gloria Lois Stone;
STATE OF OKLAHOMA ex rel.
Oklahoma Tax Commission;
PHIL RUSSELL STONE;
STATE OF OKLAHOMA ex rel.
Department of Human Services;
HOUSEHOLD FINANCE CORPORATION III;
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

CIVIL ACTION NO. 96-CV-550-K

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 16th day of July, 1997, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on April 14, 1997, pursuant to an Order of Sale dated January 21, 1997, of the following described property located in Tulsa County, Oklahoma:

> Lot Twenty-five (25), Block Seven (7), FOX RUN, an Addition to the City of Jenks, County of Tulsa, State of Oklahoma, according to the recorded Plat thereof.

Appearing for the United States of America is Peter Bernhardt, Assistant United States Attorney. Notice was given the Defendants, Michael Shue DeCorte; Gloria L. DeCorte fka Gloria Lois Stone; State of Oklahoma ex rel. Oklahoma Tax Commission through Kim Ashley, Assistant General Counsel; Phil Russell Stone through his attorney John W. Flippo; State of Oklahoma ex rel.

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Department of Human Services through its attorney Vicki A. Cox; Household Finance Corporation III through its service agent The Corporation Company; County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Purchaser, J&S Investments, Inc., by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Jenks Journal, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to J&S Investments, Inc., 632 West Main, Jenks, Oklahoma 74037, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, J&S Investments, Inc., 632 West Main, Jenks, Oklahoma 74037, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

Report and Recommendation of United States Magistrate Judge
Case No. 96-CV-550-K (DeCorte)

PB:cas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

VEO WALKER, III,

Plaintiff,

vs.

BORG-WARNER PROTECTIVE SERVICES CORPORATION,

Defendant.

No. 96-C-698-K

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 15 day of July, 1997.

Terry C. Kern

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

19

7-16-97

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

The Baker Trusts Partnership, an Oklahoma General Partnership	)	
Plaintiff,	)	
vs.	)	Civil No. 95-C-682K
United States of America,	)	
Defendant.	)	

FILED
JUL 15 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL

The plaintiff, Baker Trusts Partnership, and defendant, United States of America, hereby stipulate that the plaintiff's complaint shall be dismissed with prejudice. Each party shall bear its respective costs, including attorneys' fees or any other

mailed c/mtd c/j.

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expenses of this litigation.

This 14th day of July, 1997.

Keith A. Ward
The Richardson Law Firm
Autumn Oaks Bldg.
6846 South Cannon, Suite 200
Tulsa, Oklahoma 74136-3414
(918) 492-7674

Attorney for Plaintiff,
The Baker Trusts Partnership

Lawrence A. Casper
Trial Attorney
Tax Division
U.S. Dept. of Justice
P.O. Box 7238
Washington, D.C. 20044
(202) 514-6773

Attorney for Defendant,
United States of America

7-16-97

FILED

JUL 15 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RITA GIBBS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 97 CV 57 K
	)	
PREFERRED RISK ABSTAINERS INSURANCE COMPANY,	)	
	)	
Defendant.	)	

STIPULATION OF DISMISSAL

COME NOW the Plaintiff, Rita Gibbs, and the Defendant, Preferred Risk Abstainers Insurance Company, by and through their respective attorneys, and in accordance with Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedures, hereby stipulate to the dismissal with prejudice of all claims and causes of action involved herein with prejudice for the reason that all matters, causes of action and issues in the case have been settled, compromised and released herein, including post and pre-judgment interest.

DAN A. ROGERS

Attorney for Plaintiff

MARK A. WARMAN

Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ESTATE OF JOHNNY RAY ROBBINS,

Plaintiff,

vs.

NATOMI HOSPITALS OF OKLAHOMA, INC.; DR. CHRISTINE GENTRY, DR. ROBERT ARCHER, DR. JOHN DOE, EMERGENCY MEDICAL SERVICES AUTHORITY, and THE UNITED STATES OF AMERICA,

Defendants.

No. 97-C-348-K

ORDER

Before the Court is the motion of defendant Emergency Medical Services Authority to dismiss. Defendant argues that, under the Oklahoma Governmental Tort Claims Act, the action is untimely filed and fails to state a claim against this defendant based upon sovereign immunity. Plaintiff has not responded to the motion, and the time for doing so has passed. Upon review, the Court finds the motion to be well taken.

It is the Order of the Court that the motion of defendant Emergency Medical Services Authority (#9) to dismiss is hereby GRANTED. This action is hereby dismissed with prejudice as to

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defendant Emergency Medical Services Authority.

ORDERED this 15 day of July, 1997.

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUL 15 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

MODULAR STORAGE SYSTEMS, INC. and GREAT HOUSE,

Plaintiffs,

vs.

THE SHERWIN WILLIAMS COMPANY, an Ohio corporation,

Defendant.

Case No. 96-CV-602BU

ENTERED ON DOCKET

DATE JUL 16 1997

ORDER GRANTING APPLICATION TO DISMISS WITHOUT PREJUDICE

NOW on this 15th day of July, 1997, the Application to Dismiss Without Prejudice comes on for hearing before the undersigned judge. After reviewing the Application, the Court finds the Application to Dismiss Without Prejudice should be granted.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that this action shall be dismissed without prejudice to the refiling of any claims by either party.

MICHAEL BURRAGE
UNITED STATES DISTRICT COURT

2455-0020.plds.order granting joint application.04.wpd

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DAVID BRUCE HAWKINS,)
)
Plaintiff,)
)
vs.) Case No. 96-CV-471-B
)
STEVE W. KAISER, et al.,)
)
Defendants.)

ORDER

Before the Court for consideration is Plaintiff, David Hawkins' ("Hawkins"), Motion to Have Stricken Pleadings Resubmitted and Considered (Docket # 45) and Hawkins' Objection to Order Granting Additional Twenty (20) Day Extension of Time for Defendant Robert Davis to answer or otherwise plead (Docket # 47). Further, the Court herein considers Ronald Davis' Motion for Summary Judgment (Docket # 46).

Hawkins' Motion to Have Stricken Pleadings Resubmitted and Considered is **DENIED**. During a Court-ordered stay of the proceedings, Hawkins filed seven (7) items (Docket ## 32-36, 38, and 39). Hawkins' attempt to explain such a blatant violation of the Court's Order of May 16, 1997 (Docket # 31) staying the matter, by claiming the Order was somehow lost in an alleged random shakedown is not well taken. If the Order was lost in a shakedown, the Court can safely conclude the Order was present in Hawkins' cell during any alleged shakedown. Most probably, if the Order was in his cell, Hawkins knew of its existence. Thus, to blame prison officials for his

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violation of the Court's Order of May 16, 1997, is spurious.

For the benefit of Hawkins, the Court hereby explains why the denial of Hawkins' Motion to Have Stricken Pleadings Resubmitted and Considered is justified. First, the subject of Docket # 32, a Motion for investigation of missing documents, has been addressed by the Court and is now **MOOT**. Docket ## 33 and 34, Amended Complaints filed in 96-CV-471-B and 96-CV-804-B, respectively, and purporting to add several individuals as party defendants, is woefully beyond a reasonable time in which to add additional parties, particularly in light of the fact Hawkins knew the identity of the additional persons at the time of the filing of his Complaint in Northern District Case No. 96-CV-471-B. In the event Joe Gwinn, Mark Stoab, Brandy Page, and Edward Evans have been listed as party Defendants in this matter, each are hereby **DISMISSED WITH PREJUDICE.**

The untimeliness of Docket # 35, Hawkins' Motion for Joinder of New Parties, provides the Court grounds to deny such a motion.

Docket # 36, a Motion to supplement and attach exhibits to Response brief, contains cumulative and irrelevant documents. In light of Fed.R.Civ.P. 401, 402, and 403, the Court need not clutter the substantial record with such material.

Docket ## 38 and 39 are Motions for Default Judgment Against Ronald Davis. In light of the Court's Order amending Hawkins' Complaint to reflect Robert Davis, as opposed to Ronald Davis, as a named Defendant (Docket # 43), both Motions for

Default Judgment would be denied.

Hawkins' Objection to Order Granting Additional Twenty (20) Day Extension of Time for Defendant Robert Davis to answer or otherwise plead (Docket # 47) is noted and **OVERRULED**. Certainly, Hawkins does not suggest this Court deny due process to Defendant Robert Davis, especially when the error underlying the misnaming of Defendant Davis is attributable in large part to Hawkins. Further, it would be ludicrous for the Court to enter default judgment against Davis in the amount of eight hundred thousand dollars ($800,000.00), as sought by Hawkins, based on Davis' purported failure to timely answer.

The Court hereby **DISMISSES WITH PREJUDICE** Defendant Ronald Davis. Thus, Ronald Davis' Motion for Summary Judgment (Docket # 46) is **MOOT**.

Conclusion

Hawkins' Motion to Have Stricken Pleadings Resubmitted and Considered (Docket # 45) is **DENIED**.

Hawkins' Objection to Order Granting Additional Twenty (20) Day Extension of Time for Defendant Robert Davis to answer or otherwise plead (Docket # 47) is noted and **OVERRULED**.

Ronald Davis' Motion for Summary Judgment (Docket # 46) is **MOOT**.

Ronald Davis, Joe Gwinn, Mark Stoab, Brandy Page, and Edward Evans are hereby **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED this 15 day of July, 1997.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JIMMIE ALLIE

Plaintiff,

and

SCOTT KIRTLEY, TRUSTEE,

Intervening Plaintiff,

vs.

ANTHEM HEALTH & LIFE INSURANCE COMPANY, formerly HOME LIFE FINANCIAL ASSURANCE CORPORATION,

Defendant.

Case No. 96-CV-878-K

ORDER GRANTING JOINT STIPULATION AND APPLICATION FOR AN ORDER OF DISMISSAL WITH PREJUDICE

Upon consideration of the parties' Joint Stipulation and Application for an Order of Dismissal With Prejudice of any and all claims that have been asserted or which might have been asserted in this action, and good cause having been shown, it is this 15 day of July, 1997,

ORDERED that the parties' Joint Stipulation and Application for an Order of Dismissal with Prejudice be and it is hereby **GRANTED**; and it is further

ORDERED that the above-captioned action be and it is hereby **DISMISSED WITH PREJUDICE**, each party to pay their own costs and attorneys' fees.

Terry C. Kern
United States District Court Judge

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136026

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEBORAH K. WILLIAMS,

Plaintiff,

v.

JOHN J. CALLAHAN, Acting Commissioner of the Social Security Administration,

Defendant.

No. 97-cv-320-M

ADMINISTRATIVE CLOSING ORDER

This case was remanded to the Commissioner of Social Security (Commissioner) under sentence six of 42 U.S.C. §405(g). In accordance with N.D. LR 41, it is hereby ordered that the Clerk administratively close this action. This case may be reopened for final determination upon application of either party once the proceedings before the Commissioner are complete.

IT IS SO ORDERED.

Dated this 14th day of July, 1997.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

(8)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEBORAH K. WILLIAMS,

Plaintiff,

v.

JOHN J. CALLAHAN, Acting Commissioner of the Social Security Administration,

Defendant.

Case No. 97-C-320-M

ORDER

Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further administrative action pursuant to sentence 6 of section 205(g) and 1631(c)(3) of the Social Security Act, 42 U.S.C. 405(g) and 1383(c)(3).

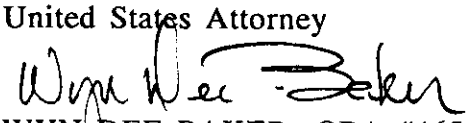
DATED this 14th day of July 1997.

Frank H. McCarthy
FRANK H. McCARTHY
United States Magistrate Judge

(7)

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney



WYN DEE BAKER, OBA #465
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MONROE ALEXANDER, III,

Petitioner,

vs.

THE DEPARTMENT OF CORRECTIONS and the ATTORNEY GENERAL of the STATE OF OKLAHOMA,

Respondent.

No. 97-CV-389-BU

ORDER

Petitioner has filed an application for a writ of habeas corpus, but has neither submitted the proper $5.00 filing fee, nor cured the deficiencies of his habeas application as directed by the Court on May 16, 1997. Specifically, the Court directed Petitioner to pay the filing fee and to amend the caption of his petition for writ of habeas corpus in accordance with Rule 2(a) of the Rules Governing Section 2254 Cases. Petitioner was granted until June 15, 1997, to comply with the Court's order. As of the date of this Order, Petitioner has failed to comply with the May 16, 1997 Order.

ACCORDINGLY, IT IS HEREBY ORDERED:

That the petition be **dismissed without prejudice** at this time for failure to pay the filing fee. See Local Rule 5.1(F). Upon good cause shown, the Court **may reinstate** this action if Petitioner submits the proper filing fee along with a motion for leave to re-open.

SO ORDERED THIS 14th day of July, 1997.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL CHRISTOPHER CONSTANTINE,

Plaintiff,

vs.

MURPHY BROTHERS EXPO; JIM'S RIDES, et al.

Defendants.

No. 96-C-899-B

ORDER

Plaintiff Michael Christopher Constantine filed his complaint in this case on October 1, 1996. On November 1, 1996, the Court granted plaintiff leave to file and maintain this action to conclusion without prepayment of fees or costs. As plaintiff did not serve summons and complaint upon the defendants within the 120 day period required by Fed.R.Civ.P. 4(m), the Court set the matter for hearing on July 14, 1997. Notice of the hearing was mailed to Plaintiff's last known address on June 12, 1997. The notice was returned marked "Refused" on June 19, 1997. Plaintiff did not appear at the hearing. Thus, the Court dismisses this action with prejudice for failure to prosecute.

ORDERED this 14th day of July, 1997.

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 14 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TANYA MORGAN,

Plaintiff,

vs.

HILTI, INC.,

Defendant.

Case No. 95-C-608-B

ENTERED ON DOCKET
JUL 15 1997

JUDGMENT

In accord with the Order filed April 3, 1996 sustaining Defendant's Motion for Summary Judgment, the Judgment filed April 3, 1996 awarding costs in favor of Defendant, Hilti, Inc. ("Hilti"), and against Plaintiff, Tanya Morgan, and the Declaration of Costs filed April 11, 1996 taxing costs to the Plaintiff in the amount of $430.50, attached hereto as Exhibit "A" and incorporated herein, the Court hereby awards costs in the amount of $430.50 to Hilti to be paid by Plaintiff.

Dated this 14th day of July, 1997.

Thomas R. Brett
United States District Judge

J. Daniel Morgan
Michelle L. Gibbens
GABLE GOTWALS MOCK SCHWABE
KIHLE GABERINO
100 West Fifth Street, Suite 1000
Tulsa, Oklahoma 74103-4219
(918) 585-8141
ATTORNEYS FOR DEFENDANT
HILTI, INC.

JUDGMENT.HIL

AO 133 (Rev. 9/89) Bill of Costs

FILED
APR 11 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

United States District Court

NORTHERN DISTRICT OF OKLAHOMA

TANYA MORGAN,
Plaintiff,
V.
HILTI, INC., a corporation in the State of New York,
~~Defendant.~~

BILL OF COSTS

Case Number: 95-C-608-B

NOTE: THE MOVANT IS REQUIRED TO NOTIFY ALL COUNSEL OF THE BILL OF COST HEARING SET IMMEDIATELY UPON RECEIPT.

Judgment having been entered in the above entitled action on April 3, 1996 against Plaintiff, Tanya Morgan,
Date

the Clerk is requested to tax the following as costs:

Fees of the Clerk	$
Fees for service of summons and subpoena	
Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case	305.30 ~~$612.30~~
Fees and disbursements for printing	125.20 ~~236.00~~
Fees for witnesses (itemize on reverse side)	
Fees for exemplification and copies of papers necessarily obtained for use in the case	
Docket fees under 28 U.S.C. 1923	
Costs as shown on Mandate of Court of Appeals	
Compensation of court-appointed experts	
Compensation of interpreters and costs of special interpretation services under 28 U.S.C. 1828	
Other costs (please itemize) Courier Service/Long Distance	~~21.55~~
TOTAL	$ ~~$869.92~~ $430.50

Bill of Cost Hearing set
5-9-96 @ 10:00 AM

SPECIAL NOTE: Attach to your bill an itemization and documentation for requested costs in all categories.

DECLARATION

I declare under penalty of perjury that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this bill was mailed today with postage prepaid to:

Katherine T. Waller, Attorney for Plaintiff, Tanya Morgan.

FILED
MAY 9 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Signature of Attorney: J. Daniel Morgan

Name of Attorney: J. Daniel Morgan, Gable & Gotwals, Inc.

For: Defendant, Hilti, Inc., a corporation in the State of New York Date: 4-11-96
Name of Claiming Party

Costs are taxed in the amount of $430.50 and included in the judgment.

38 Phil Lombardi
Clerk of Court

By: _____
Deputy Clerk

5-9-96
Date

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TERRI L. REINHOLTZ and DOUG REINHOLTZ,	)	
Plaintiffs,	)	
vs.	)	No. 97-C-516-B
WAL-MART STORES, INC., a corporation, and MIKE SUNDAY,	)	
Defendants.	)	

ORDER

Before the Court is the Motion to Remand filed by Plaintiffs Terri L. Reinholtz and Doug Reinholtz (Docket No. 6). Plaintiffs originally filed their petition in the District Court for Tulsa County on August 21, 1995 alleging state tort claims against defendants Wal-Mart Stores, Inc. ("Wal-Mart") and Mike Sunday ("Sunday") based on Sunday's alleged sexually molestation of Terri L. Reinholtz while she was employed by Wal-Mart. Almost two years later, on April 29, 1997, Plaintiffs filed an Application for Leave to Amend Petition to state a claim under Title VII, 42 U.S.C. §2000e *et seq.* On May 29, 1997, before the state court had ruled on the application, Wal-Mart removed the action to federal court based on this Court's jurisdiction over the Title VII claim. On June 11, 1997, Plaintiffs moved to remand claiming lack of jurisdiction and reciting that Plaintiffs had filed a separate suit in state court bringing their Title VII claim, rather than amend this action to state a Title VII claim. On July 1, 1997, Wal-Mart removed the separate Title VII action to federal court, which action was assigned to Judge Sven Eric Holmes, *Terri L. Reinholtz v. Wal-Mart Stores, Inc.*, Case. No. 97-C-617-H. On the same date, Wal-Mart filed an Application to Consolidate Case No.

97-C-617-H with this action (Docket No. 6).

Wal-Mart argues that it properly removed the case when it filed its Notice of Removal within thirty (30) days of receipt of Plaintiff's Application for Leave to Amend Petition to state a Title VII claim "in an attempt to comply with a literal reading of 28 U.S.C. §1446(b)." Section 1446(b) states in pertinent part:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, **motion**, order or other paper from which it may first be ascertained that the case is one which is or has become removable . . .

(emphasis added). Wal-Mart contends that it first ascertained that the action became removable when Plaintiffs filed the application.

Wal-Mart, in essence, urges the minority view. The minority view reads the plain meaning of the statute as commencing the time for removal upon the filing of the motion. *Webster v. Sunnyside Corp.*, 836 F.Supp. 629 (S.D. Iowa 1993); *Jackson v. Brooke*, 626 F.Supp. 1215 (D. Co. 1986). The majority position is that the time for removal commences when the state court grants the motion to amend because "without adjudication of the motion, the state court could ultimately deny the motion notwithstanding a prior removal to the federal forum," allowing the parties to "inundate the federal system with cases over which it technically had no jurisdiction." *Crump v. Wal-Mart Group Health Plan*, 925 F.Supp. 1214, 1218 (W.D.Ky. 1996); *Miller v. Stauffer Chemical Co.*, 527 F.Supp. 775, 777-778 (D. Ka. 1981); *Graphic Scanning Corp. v. Yampol*, 677 F.Supp. 256, 259 (D.Del. 1988).

The Court is persuaded by the rationale of the majority view, aptly set forth in *Crump, supra*:

> The issue here is easily confused with the concepts of notice and knowledge, which are so often pivotal in removal cases. Our case is unlike the situation where a defendant has unambiguous knowledge of facts from which it can ascertain a

> removable claim. In that circumstance, defendant's knowledge of a claim is paramount because it creates the right to remove and, thus, commences the thirty (30) day window for removal. Here, only Plaintiff can create the situation where a case may become removable. Defendant cannot. Though Defendant may speculate that Plaintiff intends to assert a removable claim, that speculation has no practical significance until the claim is a reality.
>
> The plain and practical reading of §1446(b) is not inconsistent with this view. Crump's motion requested permission to assert entirely new claims. Until the state court actually granted the motion, there simply was no case or claim to remove, only speculation about the court's intentions.

Crump, 925 F.Supp. at 1218-19; *DeBry v. Transamerica Corp.*, 601 F.2d 480, 489 (10th Cir. 1979) (as "ascertain" means "to find out or learn with certainty," notice must be "unequivocal" to commence the period of removal).

Wal-Mart removed the case before the state court ruled on the pending application. Thus, the Court has no jurisdiction over Plaintiffs' claims. The petition reflects lack of diversity of citizenship and alleges only state tort claims. Accordingly, the Court remands the case to the District Court for Tulsa County. Wal-Mart's motion to consolidate is moot (Docket No. 6).

ORDERED this 11th day of July, 1997.

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FENIX EQUIPMENT CO.,
an Oklahoma Corporation,

Plaintiff,

v.

MECO MACHINERY, INC.,
a Canadian Corporation,

Defendant.

Case No. 96-CV-1131-K

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Fenix Equipment Co. and Defendant, Meco Machinery, Inc., by counsel, pursuant to Federal Rule of Civil Procedure 41, hereby stipulate to dismiss the above-captioned action with prejudice, with each party to bear its own costs and attorneys' fees.

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ATTORNEYS FOR PLAINTIFF

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By: _____
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ATTORNEYS FOR DEFENDANT

ENTERED ON DOCKET
7-14-97

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
JUL 11 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JOHNATHON STRUBLE, TOM ALLRED, CHUCK KING, KARMAN WHITEHOUSE, JERRY WHITE, DOYLE JUNKER, RICHARD A. LEECE, JACQUELINE WRIGHT AND ALL OTHER SIMILARLY SITUATED EMPLOYEES

Plaintiffs,

v.

NATIONAL EDUCATION CENTERS, INC. D/B/A SPARTAN SCHOOL OF AERONAUTICS, D/B/A NATIONAL EDUCATION CENTER - NATIONAL INSTITUTE OF TECHNOLOGY CAMPUS, D/B/A NATIONAL EDUCATION CENTER - SPARTAN SCHOOL OF AERONAUTICS CAMPUS

Defendants
a California Corporation

CASE NO. 97-CV-384 K (M)

Judge Terry C. Kern

NOTICE OF STIPULATION TO VOLUNTARY DISMISSAL
BY RICHARD A. LEECE

Plaintiff, Richard A. Leece, notices the court and all parties to the above captioned case, of his voluntary dismissal from the case without prejudice, and states that the defendant, through its counsel on June 30, 1997 by telephone, agreed and stipulated to plaintiff Richard A. Leece's request to dismiss without prejudice his cause of action.

APPROVED:

R Pam Lee
Attorney for Plaintiff

Debra B. Cannon
Attorney for Defendant

mail c/s envt

CERTIFICATE OF MAILING

I R. Paul Gee hereby certify that a true and correct copy of the above and foregoing Notice was mailed by U.S. Mail to the following:

Ms. Debra B. Cannon, Esq.
McKinney, Stringer & Webster, P.C.
101 North Broadway, Suite 800
Oklahoma City, OK 73102

with proper prepaid postage affixed thereon this 2nd day of July, 1997.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JEANNIE JAMES,

Plaintiff,

vs.

Case No. 96-CV-631-C

SIOUX GRENINGER; TRENT HUMPHREY; JOE FERMO, M.D.; AND CITY OF PRYOR, OKLAHOMA,

Defendants.

JUDGMENT

This matter came before the court for consideration of the motion for summary judgment filed by defendants Sioux Greninger, Trent Humphrey and the City of Pryor, Oklahoma on plaintiff's cause of action brought pursuant to 42 U.S.C. § 1983. The issues having been duly considered and a decision having been rendered in accordance with the order filed simultaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment is entered for the defendants Sioux Greninger, Trent Humphrey and the City of Pryor, and against the plaintiff Jeannie James.

IT IS SO ORDERED this 10 day of July, 1997.

H. DALE COOK
Senior, U.S. District Judge

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JEANNIE JAMES,

Plaintiff,

vs.

Case No. 96-CV-631-C

SIOUX GRENINGER; TRENT HUMPHREY;
JOE FERMO, M.D.; AND
CITY OF PRYOR, OKLAHOMA,

Defendants.

ORDER

Before the Court is the motion for summary judgment filed by defendants Sioux Greninger, Trent Humphrey and the City of Pryor, Oklahoma. Defendants seek summary judgment by asserting, among other grounds, that plaintiff has failed to state a cause of action under 42 U.S.C. § 1983 and qualified immunity. For the following reasons defendants' motion for summary judgment should be granted.

Defendants Sioux Greninger and Trent Humphrey are police officers employed by the City of Pryor, Oklahoma. Plaintiff brings this action under § 1983, seeking relief against Greninger and Humphrey in both their official and individual capacities. Plaintiff asserts that the police officers and the municipality violated her right to liberty and due process of law under the Fifth and Fourteenth Amendments to the United States Constitution, giving rise to a § 1983 claim.

During the time May 2, 1995 through July 11, 1995, plaintiff was receiving counseling and treatment as an out-patient at Grand Lake Mental Health Center (GLMHC), having been referred by her primary care physician Dr. Serratt. Plaintiff was suffering from

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severe depression and feelings of hopelessness associated with battered woman's syndrome. Plaintiff was receiving counseling at GLMHC in an effort to remove herself from her home environment in which her husband was physically and mentally abusive toward her. Plaintiff admits that her husband was abusive and had "knocked [her] out."

On July 11, 1995 plaintiff's mental health counselor at GLMHC, Paula Vella, notified the City of Pryor police department to dispatch an officer to GLMHC to transport plaintiff to a local private hospital for a mental health evaluation. Ms. Vella contacted the police department pursuant to the Oklahoma Emergency Detention and Protective Custody Act, 43A O.S. § 5-206 et. seq.

In her complaint, plaintiff asserts that Ms. Vella wrongfully caused her to be referred to the Mayes County Medical Center under a "guise of instigating commitment proceedings against plaintiff" without any documentation and evidence that she was suffering from mental illness. Plaintiff contends that at the time GLMHC and Vella referred plaintiff to the Mayes County Medical Center, her emotional and mental health condition was improving. Officer Greninger responded to the call. Officer Greninger transported plaintiff to the Mayes County Medical Center at the request of GLMHC. Plaintiff was transported without force. Plaintiff sat in the front seat of the patrol car next to Officer Greninger who was courteous and attempted to comfort plaintiff. At the hospital Office Greninger filled out an offense report for the Pryor Police Department and a "Peace Officer's Affidavit" regarding the emergency detention of plaintiff. In the Peace Officer's Affidavit, Greninger stated that she had no personal dealings with plaintiff.

Paula Vella, plaintiff's mental health counselor, also went to the Mayes County

Medical Center to deliver GLMHC's standard form entitled "Referral to Eastern State Hospital." On the referral form Ms. Vella furnished information about plaintiff to the emergency room physician, Dr. DeLong. Ms. Vella also furnished information regarding plaintiff on a document entitled "Licensed Mental Health Professional's Statement," which she left for Dr. DeLong to review, complete and execute. Dr. DeLong reviewed and completed the "Licensed Mental Health Professional's Statement" which referred plaintiff for further evaluation to Eastern State Hospital, a state mental health hospital. Dr. DeLong also signed the Peace Officer's Affidavit, and stated on the form: "Upon personal examination of Jeannie James, I am of the opinion that this person is a person requiring treatment, and should be held in emergency detention, as provided by law." Officer Greninger's signature on the Peace Officer's Affidavit was notarized at the Mayes County Medical Center, and a clerk at the Medical Center furnished Greninger with the completed and executed "Referral to Eastern State Hospital" and the "Licensed Mental Health Professional Statement."

Due to a shift change, Officer Humphrey replaced Officer Greninger at the Mayes County Medical Center. Greninger gave Humphrey the paperwork containing Dr. DeLong's referral and directive to transport plaintiff for further evaluation to Eastern State Hospital. At no time was plaintiff handcuffed. Plaintiff admitted that Officer Humphrey's was kind to her. At Eastern State Hospital, plaintiff was admitted for temporary detention and evaluation by Dr. Fermo, a staff physician. The next day, on July 12, 1995, plaintiff was examined by Dr. Southern, a board certified psychiatrist. Dr. Southern executed a "Petition for Protective Custody and Treatment" and had the petition filed with the District Court of

Mayes County requesting an extension of the 72 hour minimum temporary mental health detention, and for a detention hearing date. The request was granted by the court and the hearing set for July 18, 1995. Following a competency hearing conducted by the Mayes County Court, plaintiff was released from temporary detention on July 18, 1995. Plaintiff asserts that she was wrongfully admitted to Eastern State Hospital on July 11, 1995 pursuant to the emergency detention order process in that she was not a person requiring treatment and posing an immediate likelihood of serious harm to herself and others, as required under the Oklahoma statute. Plaintiff seeks to hold defendants Sioux, Humphrey's and the City of Pryor liable for responding to the call and transporting plaintiff to Mayes County Medical Center and Eastern State Hospital without the specific documents required under Oklahoma statutory law.

Specifically, plaintiff contends that the police officers and the City of Pryor are liable under § 1983 because the officers complied with the directive of GLMHC to transport plaintiff to Mayes County Medical Center without first receiving a "third party affidavit" setting forth the basis for the referring person's belief that plaintiff was a person requiring treatment as set forth in 43A O.S. § 5-207. The officers testified that they relied on the referral and directives of GLMHC in transporting plaintiff to Mayes County Medical Center. Officer Greninger was furnished at the Medical Center with a completed and executed "Referral to Eastern State Hospital" which is the customary procedure followed by GLMHC in referring patients for an emergency evaluation. The executed referral form is used in lieu of a third party affidavit. The referral contained all the information required under § 5-207. The officers were furnished with this document at the Medical Center prior to

transporting plaintiff to the state mental institution for evaluation. It is undisputed that it is the duty of police officers to transport persons to a state mental hospital upon receiving a "Licensed Mental Health Professional's Statement" which is proper directive from a state licensed physician.

Plaintiff also contends that the police officers and municipality are liable for transporting plaintiff to the Mayes County Medical Center. Plaintiff contends that the Medical Center is not a "facility designated by the Commission of Mental Health and Substance Abuse Services" to obtain a physician's executed "Licensed Mental Health Professional's Statement." The defendants furnish the affidavit of Margaret Bradford, the Deputy Commissioner for Community Support Services with the Oklahoma Department of Mental Health and Substance Abuse Services. Ms. Bradford attests that under the Emergency Detention Guidelines promulgated by the Oklahoma Department of Mental Health it is proper for "an M.D. or D.O. without any kind of specialized training, who has staff privileges at a hospital such as Mayes County Medical Center, to sign the Licensed Mental Health Professional's Statement contained in the Emergency Detention Guidelines."

The actions of officers Greninger and Humphrey and the City of Pryor are "state actions" taken under color of state law. Qualified immunity shields public officials from § 1983 liability if their actions do not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). "In analyzing qualified immunity claims, we first ask if a plaintiff has asserted the violation of a constitutional right at all, and then assess whether that right was clearly established at the time of the defendant's actions." Gehl Group v. Koby, 63

F.3d 1528, 1533 (10th Cir.1995). Officers Sioux and Humphrey are entitled to summary judgment on their qualified immunity defense because plaintiff has failed to allege facts sufficient to show that the police officers violated any of plaintiff's constitutional rights. It follows that the City of Pryor is relieved of liability upon a showing that plaintiff's constitutional rights were not violated.

In seeking relief under § 1983, plaintiff asserts that her right to liberty and due process of law has been violated by these defendants. The defendants acted in substantial compliance with Oklahoma law in carrying out the provision of the Emergency Detention and Protective Custody Act. Any failure to strictly comply with the provision of the Act would constitute mere negligence and would not rise to the level of a constitutional deprivation. "Simply put, negligent conduct by a government official that injures an individual's life, liberty, or property does not rise to a Fourteenth Amendment violation actionable under § 1983." Webber v. Mefford, 43 F.3d 1340, 1343 (10th Cir.1994). In order to be held to a constitutional deprivation, the government official must have acted with deliberate or reckless intent to injure to a person's life, liberty or property. Plaintiff has failed to set forth any factual support that the officers acted with reckless intent or deliberate indifference to plaintiff's liberty interests.

Additionally, plaintiff has failed to establish that these defendants denied plaintiff due process of law. At most, the defendants committed technical violations of state law.

Accordingly, the Court finds and concludes that based on the above undisputed material facts defendants Sioux Greninger, Trent Humphrey and the City of Pryor acted reasonably under the circumstances and in substantial compliance with Oklahoma law.

The officers receipt of the "Licensed Mental Health Professional's Statement" constitutes authority under Oklahoma law for the officers to transport plaintiff to a state mental health hospital. Thus the plaintiff has failed to establish a constitutional deprivation actionable under 42 U.S.C. § 1983.

IT IS THEREFORE THE ORDER OF THE COURT, that the motion for summary judgment filed by defendants Sioux Greninger, Trent Humphrey and the City of Pryor, Oklahoma is hereby granted.

IT IS SO ORDERED this 10 day of July, 1997.

H. DALE COOK
Senior U.S. District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	ENTERED ON DOCKET
PENNWELL PUBLISHING COMPANY and PENNWELL PRINTING COMPANY,	)	DATE JUL 11 1997
	)	
Defendants.	)	**CASE NO. 97-CV-394B(M)**

ORDER

Upon the motion of the plaintiff, United States of America, to which there is no objection, it is hereby **ORDERED** that all claims against defendant PennWell Publishing Company, be dismissed without prejudice, the parties to bear their own costs and attorneys' fees.

Dated this 10th day of July, 1997.

UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

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DATE 7-11-97

FILED

JUL 10 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROSAMARY SLOAN, An individual, Plaintiff,	)	
vs.	)	Case No. 97 CV 443 H (J)
HATHAWAY CORPORATION, A Corporation, Defendant.	)	

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

The Plaintiff, Rosamary Sloan and the Defendant, Hathaway Corporation, jointly stipulate and agree that this case be dismissed with prejudice. The parties have agreed to bear their own costs and attorney fees and to not attempt to shift the burden of such costs and fees to the opposing party through the federal rules of civil procedure, or through state or federal cost or fee shifting laws or sanction rules.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM M. WARD
and
K.I. INDUSTRIES, INC.

Plaintiffs,

versus

PERSONAL AND RECREATIONAL PRODUCTS, INC

Defendant.

Case No. 96 CV 925 K

JOINT STIPULATED DISMISSALS WITH PREJUDICE

COME NOW Plaintiffs, WILLIAM M. WARD and K.I. INDUSTRIES, INC., and Defendant PERSONAL AND RECREATIONAL PRODUCTS, INC. , by and through their respective undersigned counsel, and, pursuant to Federal Rules of Civil Procedure No. 41(a)(1) and 41(c), hereby dismiss with prejudice all claims in the above-styled suit.

Each Party shall bear its own costs, attorneys' fees and litigation expenses incurred in connection with the above-styled case.

Respectively submitted,

FOR THE PLAINTIFFS:

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